

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

THE PEOPLE, ) No. S210234  
)  
Plaintiff and Respondent, ) Sacramento County  
) Sup.Ct. No 10F07981  
vs. )  
)  
ZACHERY PRUNTY, )  
)  
Defendant and Appellant. )  
\_\_\_\_\_ )

Appeal from the Sacramento County Superior Court  
Honorable Marjorie Koller, Judge

**APPELLANT'S REPLY BRIEF ON THE MERITS**

After Decision by the Court of Appeal  
Third Appellate District, Appeal No. C071065  
Filed March 26, 2013

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SUPREME COURT  
FILED

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Reply

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**APPELLANT’S REPLY BRIEF ON THE MERITS**

After Decision by the Court of Appeal  
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Appellant Zachery Prunty respectfully submits the following in reply to the Respondent’s Answer Brief on the Merits (RABOM). As for any matter not specifically addressed herein, Prunty will rely on the arguments and points and authorities in Appellant’s Opening Brief on the Merits (AOBOM). The effort to keep briefing short and concise should not be interpreted as a lack of confidence in the merits of the matters not expressly addressed. (See, *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

## ARGUMENT

### I

**EVIDENCE OF A COLLABORATIVE OR ORGANIZATIONAL NEXUS IS REQUIRED BEFORE MULTIPLE SUBSETS OF THE NORTEÑOS CAN BE TREATED AS A WHOLE FOR THE PURPOSE OF DETERMINING WHETHER A GROUP CONSTITUTES A CRIMINAL STREET GANG WITHIN THE MEANING OF PENAL CODE SECTION 186.22, SUBDIVISION (F), OTHERWISE A VIOLATION OF STATE AND FEDERAL DUE PROCESS RESULTS.**

#### A. INTRODUCTION.

Respondent limited its briefing to analysis and discussion of statutory construction of the California Street Terrorism Enforcement and Prevention Act of 1988 (STEP Act), declining to discuss either the decisions by the Courts of Appeal on the issue presented,<sup>1</sup> or the implications of the nationwide reach of the Norteños gang and its numerous subsets.<sup>2</sup> Accordingly, appellant limits his reply to statutory construction.

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<sup>1</sup> Appellant refers to *People v. Williams* (2008) 167 Cal.App.4th 983, 988; *In re Jose P.* (2003) 106 Cal.App.4th 458, 468; and *People v. Ortega* (2007) 145 Cal.App.4th 1344, 1357, discussed in the AOBOM at pages 17-30.)

<sup>2</sup> Appellant discussed the extensive membership of the Norteños gang and its numerous subsets, and in the context of this issue in his initial briefing. (AOBOM 30-40.)

**B. THE PLAIN LANGUAGE OF THE STATUTE INTRINSICALLY INCLUDES A REQUIREMENT OF COLLABORATIVE OR ORGANIZATIONAL NEXUS AMONG SUBSETS.**

The jury found true the gang enhancement allegation under section 186.22, subdivision (b). The subdivision provides enhanced punishment for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (Pen. Code, § 186.22, subd. (b).) Subdivision (f) defines “criminal street gang” as:

any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(Pen. Code, § 186.22, subd. (f) [emphasis added].)

By its plain language, subdivision (f) requires an organization, association, or group that: (1) shares primary activities; (2) has a common name, sign, or symbol; **“and”** (3) members who engage in a pattern of criminal activity. Appellant emphasizes that the word “and” appears in

subdivision (f), thereby requiring all the components to be present before an organization, association, or group is a criminal street gang within the meaning of the statute. The mere sharing of a name, e.g., Norteños, is not enough. Subdivision (f) requires a collaborative or organizational nexus. It does so by requiring that the group with a common name also “*share*” primary purposes “*and*” have members that engage in a pattern of criminal activity. These concepts, by their very nature, include a collaborative or organizational nexus. The word “share” connotes collaboration and a nexus between and among the sharers.<sup>3</sup>

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<sup>3</sup> For example, the online Merriam-Webster dictionary defines the verb share as:

1: to divide and distribute in shares: apportion  
—usually used with out <shared out the land  
among his heirs>

2a : to partake of, use, experience, occupy, or  
enjoy with others

b: to have in common <they *share* a passion for  
opera>

3: to grant or give a share in —often used with  
*with* <*shared* the last of her water with us>

4: to tell (as thoughts, feelings, or experiences)  
to others —often used with *with*.

(<http://www.merriam-webster.com/dictionary/share>.)

The above interpretation of subdivision (f) comports with the principle of statutory interpretation of criminal laws that favors the more lenient of two reasonable constructions. (Cf., *People v. Overstreet* (1986) 42 Cal.3d 891, 896-897.) The rule of lenity is dictated by the Fourteenth Amendment and ensures fair warning by resolving ambiguities in criminal statutes so as to apply them only to conduct clearly covered. (*United States v. Lanier* (1997) 520 U.S. 259, 266 [117 S.Ct. 1219; 137 L.Ed.2d 432].)

When Courts of Appeal disagree on the reasonable interpretation of subdivision (f), as evidenced by the conflicting opinions in *People v. Williams, supra*, 167 Cal.App.4th 983, *In re Jose P., supra*, 106 Cal.App.4th 458, and *People v. Ortega, supra*, 145 Cal.App.4th 1344, neither Zachery nor any other defendant had fair warning about what conduct was proscribed by subdivision (f).

The above interpretation of subdivision (f) also avoids other constitutional difficulties. Any reading of section 186.22, subdivision (f) that exposes a defendant to enhanced punishment merely because he or she associates with an “organization, association, or group” that has “a common name or common identifying sign or symbol” would effectively impose that additional punishment upon the defendant’s mere status as a gang associate. In *Scales v. United States* (1961) 367 U.S. 203, 221-230 [81 S.Ct. 146, 96

L.Ed.2d 782], which concerned an act that criminalized knowing membership in an organization advocating the overthrow of the Government of the United States by force or violence (*id.* at p. 205), the Court explained:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

(*Id.* at pp. 224-225.)

Finally, respondent's reliance on this Court's decision in *People v. Gardeley* (1996) 14 Cal.4th 605, in this context is misplaced. (Contra, RABOM 15-16.) First, this Court considered and decided whether due process was satisfied by section 186.22, subdivisions (e) and (f), taken together as they define the terms "pattern of criminal gang activity" and "criminal street gang," respectively. Second, if the interpretation of subdivision (f) is broadened, as respondent urges, then it often could include *and punish* membership in an "organization, association, or group" that has "a common name or common identifying sign or symbol." The danger is exacerbated when any Norteños subset will suffice – even subsets

that have no connection with one another, or actually are rivals. That was the situation with the Norteños subsets at issue in Zachery's case. There was intense, even deadly, rivalry among them as set forth in detail in appellant's initial briefing. (AOBOM 30-39.)

**C. THE DOCTRINE OF CONSTITUTIONAL DOUBT REQUIRES A REQUIREMENT OF COLLABORATIVE OR ORGANIZATIONAL NEXUS AMONG SUBSETS TO AVOID UNCONSTITUTIONALITY.**

The overarching and “elementary rule [in statutory construction] is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” (*Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council* (1988) 485 U.S. 568, 575 [108 S.Ct. 1392, 128 L.R.R.M. (BNA) 2001].) Respondent's approach ignores the doctrine of constitutional doubt applicable to statutory construction. (See e.g., *People v. Birks* (1998) 19 Cal.4th 108, 135-136 [discussing application of doctrine in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 512, and applying doctrine to lesser included offense instruction]; *Walton v. City of Red Bluff* (1991) 2 Cal.App.4th 117, 132–134 [applying doctrine to avoid possible federal due process notice violation]; *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 59–60.) “A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.” (*United*

*States v. Jin Fuey Moy* (1916) 241 U.S. 394, 401 [36 S.Ct. 658, 60 L.Ed. 1061].) By ignoring this doctrine, respondent's approach incorrectly narrows the concept of "plain language" to the absence of an "explicit requirement of organizational or collaborative nexus" in Penal Code section 186.22. (RABOM 10-18.) Thus, respondent attempts to reduce the issue to the question of whether the statute actually contains words such as "collaboration" or "nexus." The question is not so simple. This is why the Fifth District Court of Appeal concluded the statute required "something more than a shared ideology or philosophy, or a name that contains the same word . . . ." (*People v. Williams, supra*, 167 Cal.App.4th at p. 988.) "Instead, some sort of collaborative activities or collective organizational structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization." (*Ibid.*)

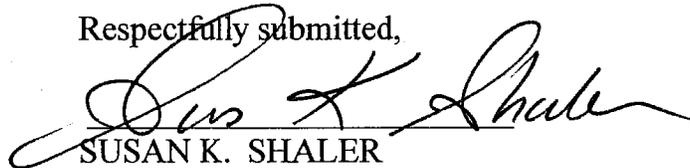
Similarly, it is not enough to conclude the Legislature's intent in enacting the STEP Act was the eradication of criminal activity by criminal street gangs. (Contra RABOM 7.) That intent could be effected by proscribing membership in criminal street gangs. But doing so is not constitutional. The interpretation of subdivision (f) urged by respondent casts too broad a net by eliminating any requirement for collaboration or nexus, and thereby violates due process. Just as the common surname of

Smith or Garcia does not connect all Smiths or Garcias, the Norteños gang is large enough, and widespread enough, that use of the name Norteños, *without evidence of collaboration or nexus*, is not the conduct proscribed by subdivision (f).

**D. CONCLUSION.**

Based on the foregoing, the evidence was insufficient because it failed to establish any collaboration or nexus among the six subsets of Norteños. Because section 186.22, subdivision (f), requires this collaboration or nexus among subsets and set gangs, the evidence was insufficient to prove the gang enhancement and must be reversed.

Respectfully submitted,



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Attorney for appellant

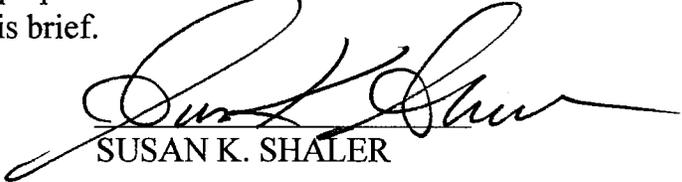
DATED: January 8, 2014

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CERTIFICATE OF APPELLATE COUNSEL  
PURSUANT TO RULE 8.360(B)(1), CALIFORNIA RULES OF COURT

I, SUSAN K. SHALER, appointed counsel for appellant hereby certify, pursuant to Rule 8.360(b)(1), California Rules of Court, that I prepared the foregoing brief on behalf of my client. I calculated the word count for the brief in the word-processing program Corel WordPerfect X6. The word count for the brief is 2,254, including footnotes, but not including the cover or tables. The brief therefore complies with the rule, which limits the word count to 25,500. I certify that I prepared this brief and this is the word count WordPerfect generated for this brief.

Dated: January 8, 2014

  
SUSAN K. SHALER

PROOF OF SERVICE  
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I reside in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action; My business address is: Susan K. Shaler, Professional Law Corporation, 991 Lomas Santa Fe Dr., Ste C, #112, Solana Beach, CA 92075.

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**APPELLANT'S REPLY BRIEF ON THE MERITS**

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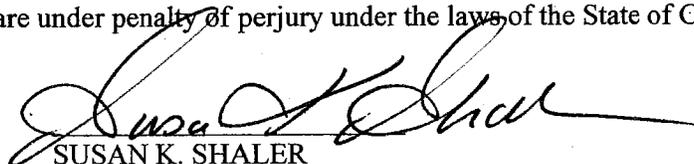
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

  
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